Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

C. C. KILGORE, ET AL.,

Petitioners,

v.

BLACK STONE OIL CO., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioners denied due process of law when Texas courts allowed Petitioners' fee simple interest in property to be destroyed by summarily applying a finding of fact in a prior lawsuit, with which Petitioners had no privity and no representation and of which Petitioners had no notice?

2. Were Petitioners denied due process of law when the finding of fact in the prior lawsuit was used, through an issue-preclusion device called "unorthodox" *stare decisis*, summarily to destroy Petitioners' property rights and to deprive Petitioners of an opportunity to be heard on their facts?

3. Were Petitioners denied due process of law by the refusal of the courts of Texas to consider Petitioners' fundamental constitutional claims, thereby allowing Petitioners' property rights to be destroyed and denying to Petitioners an opportunity to be heard?

PARTIES TO THE PROCEEDING

Because of the large numbers of both Petitioners and Respondents, separate lists of the parties are included in the Appendix (App. D, *infra*).

There are no corporations among the Petitioners to which Rule 29.6 applies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, C.C. Kilgore, et al., petition for the issuance of a writ of certiorari to the Supreme Court of Texas, as follows:

OPINIONS BELOW

The opinion of the Ninth Court of Appeals of Texas (App. A, *infra*), styled *C.C. Kilgore, et al. v. Black Stone Oil Co., et al.*, is reported at 15 S.W.3d 666. The orders of the Supreme Court of Texas denying discretionary review (App. B, *infra*) and denying Petitioners' Motion for Rehearing (App. C, *infra*) were not reported.

STATEMENT OF JURISDICTION

The opinion and judgment of the Ninth Court of Appeals of Texas were entered on April 27, 2000. Petitioners' Petition for Review was filed in the Supreme Court of Texas on June 12, 2000. The order of the Supreme Court of Texas denying Petitioners' Petition for Review was entered on January 11, 2001. Petitioners timely filed their Motion for Rehearing in the Supreme Court of Texas, which was denied by the Court by order entered on April 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS INVOKED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

Petitioners' predecessors, undisputed owners of the mineral estate of an approximately 4,000 acre tract of land, were not parties in a 1915 suit in which a jury determined on disputed evidence that the surface estate of that tract did not conflict with another tract. The mineral owners were not in privity with and were not represented by any party in the 1915 suit and there is no evidence that the mineral owners had any notice of the 1915 suit. When Petitioners sued to locate their mineral estate (this case), the courts of Texas held that the 1915 suit was *stare decisis* of the location issue based on the 1915 jury finding, thereby depriving Petitioners of their property.

A summary judgment was entered against Petitioners in this case, and sustained by the appellate courts of Texas, based solely on the alleged *stare decisis* effect of the 1915 fact-finding. Petitioners thus have not had an opportunity to be heard on their facts.

The surface estate of the tract in question, the Bartolo Escobeda League, originally surveyed in 1835, was severed from the mineral estate in deeds conveying the

surface, but reserving the minerals, executed by Petitioners' predecessors between 1902 and 1907. The two separate chains of title have remained separate since then, as, in effect, two distinct tracts of land,[1] and Petitioners have succeeded to the ownership of the mineral estate.

Petitioners sued the Respondents for conversion of oil and gas (as personalty) claimed by Petitioners to have been produced from the Escobeda mineral estate, seeking damages conservatively estimated in the hundreds of millions of dollars. Respondents claimed the right to produce the oil and gas based on agreements with the owners of the tract with which the Escobeda surface estate was found not to conflict in the 1915 suit. Respondents further asserted as an affirmative defense the claim that the 1915 surface finding was *stare decisis* of the location issue as to the separate mineral estate.

Petitioners invoked their constitutional right to due process of law at each level of the proceedings below, stating that to bind them to a fact-finding without notice, without privity and without representation would clearly deprive them of that fundamental right. Petitioners raised the due process issue in their response to the Respondents' motion for summary judgment in the trial court (App. E, *infra*), in their Appellants' Brief in the Ninth Court of Appeals (App. F, *infra*), in their Petition for

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[1] The law in Texas is that a horizontal severance of the mineral estate from the surface estate creates two separate legal estates, each with all of the attributes of title. *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1983); *Atlantic Ref. Co. v. Noel*, 443 S.W.2d 35, 40 (Tex. 1968).

Review in the Supreme Court of Texas (App. G, *infra*), in their Brief on the Merits (App. H, *infra*) and in their Motion for Rehearing in the latter court (App. I, *infra*).

None of the Texas courts addressed the clear constitutional issue raised by Petitioners.

It is undisputed that the 1915 case, affirmed on appeal in *W.T. Carter & Bro. v. Collins*, 192 S.W. 316 (Tex. Civ. App. – Beaumont, 1916, writ ref'd) (App. J, *infra*) involved only the determination of a fact question and did not involve or establish a principle of law on which to base *stare decisis*.[2]

REASONS FOR GRANTING THE WRIT

The decision by the Texas Court of Appeals in this case, which the Texas Supreme Court refused to review, is based upon the application of a doctrine, apparently unique to Texas, called "unorthodox" *stare decisis*. It allows parties in subsequent cases to be bound by fact-

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[2] The operative language of the *Collins* opinion is the following:

> "The ultimate effect of these assignments is to raise the question that the verdict of the jury on the issues of boundary is not supported by the evidence and that the charge of the court . . . is not sustained by the facts of the case . . . " 192 S.W. at 317. "These were all issues for the jury to determine from the evidence submitted to them, and, having determined them adversely to appellants, and their findings being amply supported by the evidence, it is not the province of this court to disturb them." 192 S.W. at 321.

findings in an earlier case, even when the later parties had no connection with the earlier suit. The court in this case recognized (15 S.W.3d at 667-68, *See* App. J, *infra*) that the *Collins* case did not support "orthodox" *stare decisis* (because *Collins* did not involve a principle of law) when the court chose to give binding effect to the *Collins* finding of fact. That choice did to Petitioners' mineral title what collateral estoppel could not have done: bind Petitioners by a finding of fact without privity. By attaching *stare decisis* effect to a finding of fact, the court of appeals made "unorthodox" *stare decisis*, like collateral estoppel, an issue-preclusion defense. In so doing, the court summarily disposed of Petitioners' mineral title.

However, because it applies without privity, "unorthodox" *stare decisis, i.e., stare decisis* based upon a fact-finding rather than a principle of law, on its face violates Petitioners' fundamental right to due process of law. A fact-finding in a case with which a present party has no privity, and in which he was not represented and of which he had no notice, cannot be binding on him. Further, no legitimate state interest, such as the alleged security of land titles, can rise to a level sufficient to overcome those elemental requirements of due process of law.[3]

The courts of Texas, by not addressing the constitutional issue posed sharply by the facts of this case, decided either that Petitioners have no due process right

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[3] It is worth noting that because the owners of the Escobeda minerals were not parties, the *Collins* fact-finding affected only the surface title. Thus, the "security of land titles" supported by *Collins* could only be as to the surface title, and could have no effect on the severed mineral title now owned by Petitioners.

to protect or that Petitioners' right to due process was not infringed in the circumstances presented here. The former alternative is demonstratively improper because Petitioners are the acknowledged fee simple owners of the Escobeda mineral estate, a real property interest which cannot be destroyed by state action without due process of law. *See, e.g., Buchanan v. Worley*, 245 U.S. 60, 74, 38 S.Ct. 16, 62 L.Ed. 149 (1917).

The decision made by the courts below, including the Texas Supreme Court by its denial of review, is therefore that Petitioners were not deprived of due process, even though they have lost their property without the opportunity to protect it. That decision, that a fact-finding is binding on strangers to the first suit, conflicts with decisions of this Court.

The issue is whether the loss of property rights by the effect of judicial proceedings, in the absence of notice, privity and representation, violates the property owners' fundamental right to due process of law. This Court has addressed that issue and answered the question in the affirmative in many cases, among them *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107 (1930); *Hansberry v. Lee*, 311 U.S. 32, 40-41, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940); *Blonder-Tongue Lab. Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323, 332, 99 S.Ct. 645, 650, 58 L.Ed.2d 522 (1979); *Richards v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76 (1996); and most recently in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167, 119 S.Ct. 1180, 1185, 143 L.Ed.2d 258 (1999).

The constitutional thesis of the above cases – the touchstone of due process in this context – is that strangers to the earlier case cannot be bound by the earlier judgment. As stated in *Richards*, quoting from *Hansberry v. Lee*, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." 517 U.S. at 798. The effect of the judicial proceedings here is to invoke an issue-preclusion doctrine (at the behest of Respondents) to prevent Petitioners from having a jury trial on their facts, which are different from, and more compelling than, the evidence considered in 1915.[4]

Issue-preclusion doctrines, however, can run afoul of the requirements of due process. For example, this Court has examined "extreme applications of the doctrine of res judicata" to determine whether they are inconsistent with "a federal right that is 'fundamental in character.' " *Richards*, 517 U.S. at 797, quoting from *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 38 S.Ct. 566, 62 L.Ed. 1215 (1918). *Postal Telegraph*, in turn, relies on the familiar and fundamental principles of due process enunciated in *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565 (1877), that a judgment may not be enforced against a person, even if he was named in the suit, without an opportunity to be heard. Petitioners' predecessors were not named in the

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[4] Petitioners located and presented as summary judgment evidence in this suit surveying information which predated the evidence in the 1915 suit, and which was not considered in the trial of that case.

1915 suit, yet a trial of Petitioners' location issue is being precluded, without a hearing, by the courts of Texas.

The holdings of this Court establish beyond question that the use of either res judicata or collateral estoppel to bind a litigant in a later suit depends upon either privity or representation – privity with the earlier litigants or effective representation by the earlier litigants. *See Richards; South Central Bell.* This case falls precisely within those holdings because the use of *stare decisis* based upon a fact determined in the 1915 case is the functional equivalent of collateral estoppel. Thus, without notice, without privity and without representation, Respondents have sought to bind Petitioners by the "do not conflict" fact-finding in the 1915 case. Since the establishment of Petitioners' ownership of the produced minerals depends upon proof of their location, the action by the courts of Texas sustaining Respondents' *stare decisis* defense destroys Petitioners' property rights in the mineral estate. Without question, that is "state action" within the prohibitive restriction of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948).

The Court's recent holding in *South Central Bell* confirms that if privity and some sort of special relationship are absent, an issue-preclusion defense "is inconsistent with *Richards* and with the Fourteenth Amendment's due process guarantee." 526 U.S. at 168. There is no privity and no special relationship here.

Without question, Petitioners have not been given an opportunity to be heard. That opportunity is the *sine qua non* of due process. *Armstrong v. Manzo*, 380 U.S. 545, 552,

85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (an opportunity to be heard must be given "at a meaningful time and in a meaningful manner."); *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976) (due process requires "notice of the case . . . and an opportunity to meet it"); *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 332, 99 S.Ct. 645, 652, 58 L.Ed.2d 552 (1979) (parties must be afforded a "full and fair" opportunity to litigate their claims); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, 1897, 72 L.Ed.2d 262 (1982) (collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue). Neither Petitioners nor their predecessor owners of the Escobeda mineral estate have been given an opportunity to prove the location of their property.

The decision by the Texas Supreme Court to deny review of Petitioners' constitutional claim is a denial of their claim. That denial cannot be squared with the Fourteenth Amendment's due process guarantee. This Court has stepped in many times to correct failures by state courts to give effect to that guarantee. (See, e.g., *South Central Bell; Richards; Hansberry; Brinkerhoff*). The courts of Texas, by failing to allow Petitioners an opportunity to be heard, and by allowing Petitioners' property interests in the Escobeda minerals to be destroyed by a fact-finding to which Petitioners were strangers, have denied to Petitioners the due process of law to which the United States Constitution guarantees them.

CONCLUSION

To review this important question of federal constitutional law, the Court should grant the petition for writ of certiorari, for which Petitioners pray.

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-98-143 CV

C. C. KILGORE ET AL, Appellant

V.

BLACK STONE OIL COMPANY ET AL, Appellee

On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. 16,791

OPINION

(Filed Apr. 27, 2000)

In this suit for conversion of oil and gas and title to minerals, the appellants raise four issues. Issue one complains of the trial court's grant of summary judgment applying *stare decisis* to a case this Court decided some eighty-three years ago in *W. T. Carter & Bro. v. Collins*, 192 S.W. 316 (Tex. Civ. App. – Beaumont 1916, writ ref'd). Based upon the doctrine of *stare decisis* as it is applied to cases involving the determination of boundary lines, we conclude the trial court did not err in granting the summary judgment in question. Because of this holding, the only other issue we need address is appellant's complaint regarding improper venue transfer. We find no need to

address the issue regarding privileged documents, because our holding on the *stare decisis* issue extinguishes the need for consideration of any extraneous survey evidence on the alleged boundary dispute. We overrule appellants' complaint challenging the venue ruling because venue in Polk County was mandatory under TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon Supp. 2000).

STARE DECISIS

The issue that impends upon the others is whether, under the doctrine of *stare decisis*, this court's opinion in *Carter v. Collins* stands as a bar to appellants' claims as a matter of law. Central to this issue is an unresolved question about how Texas courts apply *stare decisis* to boundary line cases. *See Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964); *see also* Gus M. Hodges, *Stare Decisis in Boundary Disputes: Let There Be Light*, 21 TEX. L. REV. 241 (1943). There are two divergent notions about how *stare decisis* should be applied to Texas boundary line cases, the orthodox doctrine and an unorthodox approach. The orthodox doctrine of *stare decisis* determines only questions of law. *Id.* at 242. After a legal question has been squarely decided by the Supreme Court, its decision is precedent, binding it and courts of lower rank when the identical question is raised in a later suit between different parties. *See Swilley*, 374 S.W.2d at 875.

In contrast to the orthodox doctrine of *stare decisis*, some courts of appeals have concluded that a fact issue determination – i.e., the fixing of boundary lines, headright surveys, or other fixed real property markers – may

be binding precedent under the doctrine of *stare decisis*. *See Rice v. Armstrong*, 616 S.W.2d 415, 417 (Tex. Civ. App. – Texarkana 1981, writ ref'd n.r.e.). Under this approach, the location of a boundary line will control the location of the same line in a later suit even though the first case turned upon an issue of fact or the legal questions of the later case are not those of the first case. *See Swilley*, 374 S.W.2d at 875.

This court has addressed this notion of *stare decisis* in three opinions. *See Atchley v. Superior Oil Co.*, 482 S.W.2d 883 (Tex. Civ. App. – Beaumont 1972, writ ref'd n.r.e.); *Patterson v. Peel*, 149 S.W.2d 284 (Tex. Civ. App. – Beaumont 1941, writ ref'd); and *McDonald v. Humble Oil & Refining Co.*, 78 S.W.2d 1068 (Tex. Civ. App. – Beaumont 1935, writ dism'd). And we adhere to the unorthodox view. *See Atchley* 428 S.W.2d at 897-98.

Asserting that they own the mineral interests in the Escobeda League in Polk county, appellants sued appellees for converting oil and gas that they contend belonged to them and was produced from the Escobeda League. Essential to their recovery is appellants' contention that the Escobeda League conflicts with three surveys, the Colville, Thompson, and Wylle.[1] Appellees pleaded a defense under the doctrine of *stare decisis* and moved for summary judgment. Appellees contended the appellants were suing them for converging oil and gas produced from lands located under the Colville, Thompson, and Wylle Surveys, that those surveys did not

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[1] We have adopted the spelling of Wylle that is used on the plat in *Carter v. Collins*, 192 S.W. at 318.

conflict with Escobeda, and that the absence of any conflict was forever determined by this court in *Carter v. Collins*. In this case, appellants do not claim under any of the parties to *Carter v. Collins*. Their claims are based upon earlier severances of the Escobeda mineral interests. But their claims urge the same conflict between Escobeda and Colville as that urged by the appellants in *Carter v. Collins*.

Carter v. Collins was an action trespass to try title brought by the appellees of that case to recover most of the Thomas Colville League. *See W. T. Carter & Bro. v. Collins*, 192 S.W. at 317. Appellants in that earlier case disclaimed any interest in Colville except to whatever part of Colville was included within the boundaries of Escobeda. *Id.* The jury found that Colville and Escobeda do not conflict. *Id.* in 1916, this court identified the principal question as whether the Colville and Escobeda leagues were in conflict. *Id.* In our earlier opinion, the court concluded that the evidence sustained the jury finding of no conflict. In reaching its conclusion, the court discussed in detail the relevant evidence beginning with the original survey of Escobeda in 1835. *Id.* at 317-21.

While the quality of the surveying efforts described in *Carter v. Collins* was at times inept at best, nevertheless, we conclude, after a rather painstaking and detailed review of the various boundary descriptions, as well as the illustrated plat reproduced in the opinion, that sufficient evidence was contained in the record in the prior case to support the jury's finding that the two boundary descriptions of the Escobeda League and the Colville League do not conflict in that they were not superimposed, one survey on top of the other. *Carter v. Collins*

was a trespass to try title case in which the appellants "disclaimed any interest in or title to the Thomas Colville League, save and except whatever part thereof might be included within the . . . Bartolo Escobeda League of land. . . . " *Id.* at 317. Appellants, in essence, were claiming ownership to property *only* to the extent it was reflected in the Escobeda League boundary survey. The issue was simply decided by having the jury compare the two surveys, review an illustrated plat admitted into evidence, and evaluate testimony from witnesses. *Id.* at 318.

With regard to the evidence reviewed by this Court in the earlier case, we observed that "[t]he great preponderance of the evidence in this case establishes the fact that the Thomas Colville league was actually located on the ground as shown in the above plat." *Id.* at 319. Having said that, we then went on to methodically set out the inaccuracy in the purported location of the Escobeda survey in relation to other correctly established surveys and in relation to the existence of natural objects found and identified on the ground. *Id.* at 319-321. This was done by applying the following legal maxim which provides for a qualitative classification and grade of calls in survey and field note interpretation:

> It is the law of this state that where the natural objects, as called for in the field notes, can be actually found and identified on the ground as showing the footsteps of the surveyor, both course and distance, when inconsistent therewith, must give way and be disregarded.

Id. at 321.

After conducting this very detailed analysis of the Escobeda survey *vis-a-vis* well-established neighboring surveys and natural, identifiable objects, we concluded:

> It is to be seen that if the Escobeda league is located as contended for by the appellees, it places it out of conflict with the other leagues and surveys, all of which were made by the same surveyor, and within a very short period of each other, and acquits the surveyor of doing an irrational thing, that of surveying one league upon another, when it was his official duty to locate the survey upon vacant domain, and without any intervening vacancies.

Id. Since the "other leagues and surveys" do indeed include the Thompson and Wylle leagues, as represented on the illustrated plat contained in the opinion, we find that *Carter v. Collins* establishes the accuracy of those surveys, as well as the fact that Escobeda is not in conflict with the other surveys. *Id.* at 321.

Our reading of *Carter v. Collins* in its entirety leads us to the conclusion that boundary lines were determined for a number of leagues, including the three at issue in the instant case. Therefore, *stare decisis* controls. The spirit of the so-called unorthodox view of *stare decisis* is certainly defeated if a decision must turn on whether exact metes and bound appear in detail in the prior opinion. As noted above, over eighty-three years have passed since this Court handed down *Carter v. Collins*. The parties to that case, as well as any successors in interest, have had to live with the boundaries established therein. To step in at this point in time and essentially "wipe the slate clean" would, we believe, cause irreparable harm. The Texas

Supreme Court has historically recognized the need for real property issues to remain settled once the appellate courts have spoken, *viz*:

> The distinction [legal distinction between "mortgages" and "assignments" in conveyances of real property] so recognized has become a long-established rule, under which many transactions have been entered into, which involve property of great value. Such being the case, we are not at liberty to overrule the former decisions of the court upon the question. It is far more important that a line of decisions under which valuable rights have accrued should be deemed settled than that the court should conform to what may be thought a more correct technical rule.

Adams v. Bateman, 88 Tex. 130, 30 S.W. 855 (1895). *See also Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424, 442 (1946) (opinion on reh'g) ("Since the Century[2] and Gulf-Atlantic[3] cases were decided so many years ago and many property rights have no doubt been acquired under them, we should not at this late day change them, even though doubt as to their correctness may exist in the minds of some lawyers and judges."). We, therefore, find no abuse of discretion by the trial court in granting appellees' motion for summary judgment based upon the doctrine of *stare decisis*. Issue one is overruled.

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[2] *Railroad Comm'n v. Magnolia Petroleum Co.*, 130 Tex. 484, 109 S.W.2d 967 (1937), was generally known as the "Century" case. *See Trapp*, 198 S.W.2d at 439.

[3] *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W.2d 73 (1939).

VENUE

Appellants complain that the trial court erred in transferring this case from Harris County to Polk County. According to appellants, venue was proper in Harris County under TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.002(a)(2) and (3) and 15.005, because some of the appellees either resided in Harris County or had their principal offices there. Appellants concede that § 15.011 is mandatory, but contend this case is a suit for the recovery of personality and its venue is not governed by § 15.011. We overrule appellants' complaint because their suit, as discussed under the *stare decisis* issue, is essentially one for the recovery of land. *See Renwar Oil Corp. v. Lancaster*, 154 Tex. 311, 276 S.W.2d 774, 776 (1955). Accordingly, mandatory venue of this suit was in Polk County.

For the reasons stated above, we affirm the grant of summary judgment by the trial court.

AFFIRMED.

DAVID FARRIS[4]

Submitted on October 28, 1999
Opinion Delivered April 27, 2000
Publish

Before Walker, C.J., Stover and Farris, JJ.

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[4] The Honorable David Farris, sitting by assignment pursuant to TEX. GOV'T CODE ANN. § 74.003(b) (Vernon 1998).

APPENDIX B

[SEAL]

THE SUPREME COURT OF TEXAS
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DEPUTY EXECUTIVE ASS'T
JIM HUTCHESON

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

I, JOHN T. ADAMS, Clerk of the Supreme Court of Texas, do hereby certify that the attached two (2) pages contain a true and correct copy of the order denying the petition for review on January 11, 2001 in the Supreme Court of Texas, in case **No. 00-0582 (C. C. KILGORE, ET AL. v. BLACK STONE OIL CO., ET AL.)**, as the original of said document appears of record on file in this office.

IN TESTIMONY WHEREOF, witness my hand and the SEAL OF THE SUPREME COURT OF TEXAS at the City of Austin this the 9th day of April, 2001.

JOHN T. ADAMS, CLERK

by /s/ Nancy J. Vega
Nancy J. Vega, Deputy

[SEAL]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

January 11, 2001

Ms. Jeffee L. Martinez-Vargas
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Mr. James D. Thompson, III
Vinson & Elkins
1001 Fannin, Suite 2300
Houston, TX 77002-6760

RE: Case Number 00-0582

Court of Appeals Number: 09-98-00143-CV

Trial Court Number: 16,791

Style: C. C. KILGORE, ET AL.
v.
BLACK STONE OIL CO., ET AL.

[SEAL]
THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

Dear Counsel:

Today, the Supreme Court of Texas denied both petitions for review in the above numbered and styled case. Petition on behalf of C.C. Kilgore, et al. is denied, as amended.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Carol Anne Flores, Clerk
Ms. Nell Lowe

APPENDIX C

[LOGO]

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711

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FAX: (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
NATHAN L. HECHT
CRAIG T. ENOCH
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT
DEBORAH G. HANKINSON
HARRIET O'NEILL
ALBERTO R. GONZALES

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

DEPUTY EXECUTIVE ASS'T
JIM HUTCHESON

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

I, **JOHN T. ADAMS**, Clerk of the Supreme Court of Texas, do hereby certify that the attached two (2) pages contain a true and correct copy of the order denying both motions for rehearing April 05, 2001 on the petition for review in the Supreme Court of Texas, in case **No. 00-0582 (C. C. KILGORE, ET AL. V. BLACK STONE OIL CO., ET AL.)**, as the original of said document appears of record on file in this office.

IN TESTIMONY WHEREOF,
witness my hand and the
SEAL OF THE SUPREME COURT OF TEXAS
at the City of Austin
this the 9th day of April, 2001.
JOHN T. ADAMS, CLERK

by /s/ Nancy J. Vega
Nancy J. Vega, Deputy

(SEAL) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

April 05, 2001

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RE: Case Number 00-0582
Court of Appeals Number: 09-98-00143-CV
Trial Court Number: 16,791

Style: C. C. KILGORE, ET AL.
v.
BLACK STONE OIL CO., ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied both motions for rehearing in the above styled petitions for review.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Carol Anne Flores, Clerk
Ms. Nell Lowe

APPENDIX D

IDENTITY OF PARTIES

PETITIONERS

Charles C. Kilgore
Ann Bullard Allen
Margaret Anderson
Carl Autry
Daniel Autry
Earl C. Autry
Grover P. Autry
Maggie Autry
Orville Autry
William Eugene Autry
Julia Ann Kilgore Baker
Seamon W. Bayles
Wanda Beal
Jean Bennette
Evelyn Blue
Josette Blue
Bobby Bullard
Getsy Cain
Lisa Camille
Donna Kay Deal Carter
David S. Carwile
E. Cary Carwile
Linda R. Carwile
William L. Carwile III
Ann Chambers
Cynthia Hall Chambers
Nancy Lee Kilgore Clark
Robert Clegg
Estelle Eakin Woolwine Cole
Margaret B. Conley
Mary Conyers
Billie Cooper
Bonnie Blue Covell
Janet S. Coyle
Donald A. Currie
Edgar I. Currie
Grover C. Currie
Mary Currie
Robert A. Currie
Tucker R. Currie
Mary Cutler
Maxine A. Dale
Bertie Daniels
Faye Bullard Davis
Jenny Clare Drews
Harriette Frances Woolwine Droke
Margaret M. Ellis
Fred Allen Faircloth
Honesta Faircloth
Leavy Faircloth
Oscar L. Faircloth
Worth H. Faircloth
Rachel Feist
Elsie J. Gallant
Ann T. Gemmel
Bill R. Gray
Allie B. Habel
Jesse H. Hall
Katherine Jenny Hall
Cecile Pattillo Harbaugh
Jerry Hawkins
Sharon Nunnery Helmey

Gladys M. Hester
Thereze Hester
Monnie C. Hiester
Ann Turner Hoffman
M.B. Hoffman
Joseph H. Hoffman III
Phyllis Jo Hoge
Linda Faye Sessoms Hood
Carlessie Humphrey
Lula Jackson
Bertie N. Jessup
William O. Jolly
Allin Mitchell, Jr.
Charles C. Kilgore, Jr.
Georges F. Massot, Jr.
J.E. Puccini, Jr.
Joseph H. Hoffman, Jr.
Marion D. Faircloth, Jr.
Walton E. Hall, Jr.
Claudia Keys
Charles C. Kilgore
Edna Kilgore
James Joseph Kilgore
Joseph C. Kilgore
Theodore Kilgore
Thomas Patrick Kilgore
William A. Kilgore
Gladys M. Klug
Susan Parker Lane
Mary Logan
Mabel Matthews
Clare McClure
Charles McDonald
M. Worth McDonald
Mary McGaughey
Robert L. McManus
Doris McPhail
Ruby McPhail
William McPhail
Methodist Children's Home
Donna Metzger
Allin Mitchell, Jr., Trustee for Mary Jane Mitchell
Currie Monroe
Viola Monroe
Sheila Diane Moore
Tina Louise Moore
Laurie Moreland
Carolyn Naylor
Albert Allen Nunnery
Dewey Nunnery
Joey Nunnery
Katye Lois Nunnery
Lisa C. Nunnery
Peter J. Nunnery
Samuel Wesley Nunnery
Sylvia C. Nunnery
Tamara Nunnery
Walter D. Nunnery
Wayne Gray Nunnery
James Parker
John Edward Parker
William H. Parker
Robyn Parsons
Esther C. Patterson
David L. Pattillo
Edith H. Pattillo
John L. Pattillo
Robert C. Pattillo
William Pattillo
Hilda May Woolwine Drummeller Person

Isolene Privette
Lois Bayles Ramos
Robert E. Reeves
Judy Porter Reid
Betty Ross
Rebecca S. Lowrey
Charles Schmid
Helen Arlene Schmid
Rosetta Schneider
Mary Sessoms
John H. Smith
Leslie S. Smith
Janie Sova
James P. Spell
William McPhail, Sr.
Romelia Stanley
Cecil Warren Stewart
Kenneth D. Stewart
Margarite Stewart
Mollie S. Stewart
Thomas C. Stewart
Margaret Tavenner
Donald L. Taylor
William H. Taylor
Margaret S. Tripp
The Moody National Bank, as Trustee of the Mary Cecile Chambers Scholarship Trust
Cornelia S. Tyndall
Ruth Tyndall
Rebekah Villano
Christine Schmid Vlastelica
Hazel Wenrich
Beatrice Williams
Peggy Williams
Jane Williamson
John Hoge Woolwine III
Gary Yazell
Philip Yazell

RESPONDENTS

Black Stone Oil Company
A&S Operating
Arthur-Smith Corporation
Black Stone Holdings Partnership
Henry C. Beck
Patricia D. Beck
Walter Bosecker
Clyda Bosecker
C&S Holdings Partnership
Caprock Pipe & Supply, Inc.
Catesby W. Clay
Comstock Oil & Gas, Inc.
Comstock Resources, Inc.
Daniel L. Crutcher
Dr. Richard Crutcher
Alan Dalby
Wirt Davis II
W.P. Dillard
C.T. Dolan
ETOCO, Inc.
Harris Trust & Savings Bank, Trustee, Stanton Armour Trust dated 2/10/66
Harris Trust & Savings Bank, Trustee, Lester Armour Trust dated 7/1/66
Harvard Energy Partners L.P.
Hennig Production Company

Hugh J. Idstein
Jubilee Exploration Inc.
Jubilee Petroleum Co., Inc.
KCS Resources, Inc.
KERRCO, Inc.
Beverly Kirill
Peter Kirill
KWB, Inc.
Lake Ronel Oil Company
C.D. Langhorne, Jr., Inc.
K.D. Manby
NationsBank of Texas, N.A., Trustee Under Agreement for Eula May Johnson
NationsBank of Texas, N.A., Trustee Under Will of Henry R. Clay
NationsBank of Texas, N.A., Trustee Under Agreement for Iris E. Tollett f/b/o Jason Blake Tollett, Jr.
NationsBank of Texas, N.A., Trustee Under Agreement for Judy Roberts McCollum
NationsBank of Texas, N.A., Trustee Under Agreement for Vivienne H. Wilson
NationsBank of Texas, N.A., Trustee Under Agreement for Cathy J. Williams
NationsBank of Texas, N.A., Trustee Under Agreement for James D. Jackson
NationsBank of Texas, N.A., Trustee Under Agreement for Iris E. Tollett f/b/o Raymond L. Tollett, Jr.
Ogletree Oil Production Co.
Oryx Development Limited Partnership by its general partner Sun Operating Limited Partnership by its managing limited partner Oryx Energy Company
Robert Palmquist
Parsons Energy Company, Inc.
POKO/P Limited Partnership
RWI Partnership
Salzau III
Samson Resources Company
Joseph Sassin
Charles D. Schott
Deborah J. Shammo c/o NationsBank Trust Oil & Gas

Union Exploration
Partners (Delaware),
Limited Partnership by
its general partner
Union Oil Company of California
W.T. Carter & Bro.
Daniel Walker
Wiggins Brothers, Inc.
Peter N. Wiggins III
Peter N. Wiggins III,
Trustee
Willow Creek Resources,
Inc.
Woolly Bugger Partners,
Ltd.
J. Lee Youngblood Trust

APPENDIX E

NO. 16,791

C.C. KILGORE, ET AL Plaintiffs	§ § §	IN the DISTRICT COURT OF POLK COUNTY, TEXAS
vs.	§	258TH JUDICIAL
BLACK STONE OIL CO., ET AL	§ §	DISTRICT
Defendants	§ §	

PLAINTIFF'S PRELIMINARY AND PARTIAL RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiffs submit to the Court a preliminary, and partial, response to Defendants' *stare decisis* motion for summary judgment. The response is not complete because the evidence on fact questions has not been fully developed. The response is preliminary because it is being filed in advance of the due date for the filing of responses to summary judgment motions and does not contain all of the matters (e.g., fact questions) that Plaintiffs say will defeat Defendants' motion. It is submitted in support of Plaintiffs' position that *stare decisis* cannot apply here, both as a response to Defendants' motion for summary judgment and to demonstrate to the court that Plaintiffs should not be limited in the scope of permitted discovery merely to the *stare decisis* issue.

STATEMENT OF THE CASE

Plaintiffs are the owners of undivided interests in the mineral estate of the Bartolo Escobeda League, A-30, Polk County, Texas, which were severed and reserved in three deeds in 1902, 1903

* * *

8. *Stare Decisis* Deprives Plaintiffs Of Their Property Without due Process Of Law And Due Course Of Law

Because Plaintiffs' predecessors (1) were not parties in *Carter v. Collins*; (2) were not privies of parties in that case; and (3) were not represented and did not control the presentation of claims in that case, if Plaintiffs are barred by *stare decisis* from presenting their claims here, they will be denied a full and fair opportunity to litigate the issue. Having that opportunity is an elementary requirement of procedural due process of law. See *Parklane Hosiery Co. v. Shore*, 439 U.S 322, 332 (1979).

The effect of enforcing the jury finding in *Carter v. Collins* against Plaintiffs here is to preclude the relitigation of the *fact* issue. That is the function of *collateral estoppel*. Since elementary principles of due process prevent the preclusive effect of collateral estoppel when the above-listed elements are absent, a procedural device which has the *same effect* as collateral estoppel is equally infirm when it, too, lacks the essential due process safeguards listed above. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (due process denied when person against whom conclusive effect of judgment is invoked was not a party or privy to the prior judgment).

This precise issue, that application of *stare decisis* in a boundary case would deprive a litigant of due process if law, has not been addressed by Texas courts nor, so far as Plaintiffs have been able to determine, by any court in the United States. Nevertheless, the basic concepts and principles, stated above, are clear. Thus, to the extent a prior decision turns on a question of *fact*, as opposed to a question of *law*, elementary principles of due process deny preclusive effect against strangers to the prior case. That is the situation here. To preclude Plaintiffs from their day in court based on fa fact-finding in *Carter v. Collins* is to deny Plaintiffs a full and fair opportunity to litigate the issue, and thus violates Plaintiffs' right to due process of law. That conclusion is true under both Amendment Fourteen to the United States Constitution and Article I, § 19 of the Texas Constitution.

It is unquestioned that due process must be afforded to litigants where property rights are in issue. *Steddum v. Kirby Lumber Co.*, 221 S.W. 920 (Tex. 1920). The protection of a person's right to own property is one of the most important purposes of government. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977). Plaintiffs are the owners of interests in an undivided 3,967 acres of the mineral estate in the Escobeda League. That estate was not involved in *Carter v. Collins*. The application of *stare decisis* to bar Plaintiffs' claims will therefore deprive them of their property without the opportunity to present evidence of their claims. That deprivation is a denial of due process of law and due course of law. See *Derbigney v. Bank One*, 809 S.W.2d 292, 295 (Tex. App. – Houston [14th Dist] 1991, no writ) (the right to be heard includes a full hearing, the right to produce evidence at a meaningful

time and in a meaningful manner, and to have judicial findings based on that evidence).

* * *

APPENDIX F

NO. 09-98-143CV

IN THE COURT OF APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AT BEAUMONT

C.C. KILGORE, et al.,

Appellants

v.

BLACK STONE OIL COMPANY, et al.,

Appellees

APPELLANTS' BRIEF

OF COUNSEL:
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ORAL ARGUMENT REQUESTED

(Filed Jun 3, 1998)

* * *

H. *Stare Decisis* Based On A Fact Question Deprives Appellants Of Their Property Without Due Process Of Law And Due Course Of Law

Because Appellants' predecessors (1) were not parties in *Carter v. Collins*; (2) were not privies of parties in that case; and (3) were not represented and did not control the presentation of claims in that case, if Appellants are barred by *stare decisis* from presenting their claims here, they will be denied a full and fair opportunity to litigate the issue. Having that opportunity is an elementary requirement of procedural due process of law. *See Parklane Hosier Co. v. Shore*, 439 U.S. 322, 332 (1979). *See also Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

The effect of enforcing the jury finding in *Carter v. Collins* against Appellants is to preclude the relitigation of the *fact* issue. That is what *collateral estoppel* does. Since elementary principles of due process prevent the preclusive effect of collateral estoppel when the above-listed elements are absent, a procedural device which has the *same effect* as collateral estoppel is equally infirm when it, too, lacks the essential due process safeguards listed above. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (due process denied when person against whom conclusive effect of judgment is invoked

was not a party or privy to the prior judgment); *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1176 (5th Cir. 1987) (party not joined in prior case has due process right to be heard).

The basic concepts and principles, stated above, are clear: to the extent a prior decision turns on a question of *fact*, as opposed to a question of *law*, elementary principles of due process deny preclusive effect against strangers to the prior case. That is the situation here. To preclude Appellants from their day in court based on a fact-finding in *Carter v. Collins* is to deny Appellants a full and fair opportunity to litigate the issue, and thus violates Appellants' right to due process of law. That conclusion is true under both the Fourteenth Amendment to the United States Constitution and article I, § 19 of the Texas Constitution. [Appendix, tabs 4 and 6]. See *Derbigney v. Bank One*, 809 S.W.2d 292, 295 (Tex. App. – Houston [14th Dist] 1991, no writ) (the right to be heard includes a full hearing, the right to produce evidence at a meaninful time and in a meaningful manner, and to have judicial findings based on that evidence).[31]

* * *

---

[31] The constitutional issues raised by this and the previous point are confirmed by Professor Hodges in his *stare decisis* article. See Hodges, 21 Tex. L. Rev. at 275. [Appendix, tab 20].

APPENDIX G

NO. 00-0582

IN THE SUPREME COURT OF TEXAS

C.C. KILGORE, ET AL

Petitioners

v.

BLACKSTONE OIL CO., ET AL

Respondents

On Petition For Review From The Ninth District Court of Appeals at Beaumont, Texas

PETITION FOR REVIEW

(Filed Jun 12, 2000)

Respectfully submitted,

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SHEINFELD, MALEY & KAY
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(713) 658-9756 (fax)
ATTORNEYS FOR PETITIONERS
C.C. KILGORE, ET AL

* * *

2. Barring The Relitigation Of A Fact Issue Without Procedural Safeguards Violates Due Process.

Using "unorthodox" *star decisis* to give a fact question the effect of a principle of law, where no privity exists, violates due process. The holding by the Beaumont court operates to bind Petitioners to the factual result in *Carter v. Collins* when, because no privity exists, collateral estoppel would *not* bind them to that result. Petitioners have been deprived of the essential safeguards of due process.

The procedural safeguards for the application of collateral estoppel are that the parties to the cases in issue are identical, or that the current parties are in privity with parties in the earlier case, or that the current parties were represented in the first case and controlled the presentation of claims in that case. *Benson v. Wanda Pet. Co.*, 468 S.W.2d 361, 363-64 (Tex. 1971); *Tartar v. Metropolitan Sav. & Loan Ass'n.*, 744 S.W.2d 926, 927 (Tex. 1988). Applying collateral estoppel in the absence of such procedural safeguards denies to a current party a full and fair opportunity to litigate the fact issue. Denying Petitioners that elementary opportunity deprives them of procedural due process of law. *Parklane Hosiery v. Shore*, 439 U.S. 322, 332 (1979); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). U.S. Const. Amendm. XIV; Tex. Const. art. I, Sec. 19.

A procedural device which has the same effect as collateral estoppel, but lacks the essential safeguards, such as the way *stare decisis* was applied here, denies due

process. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982); *Benson & Ford Inc. v. Wanda Pet. Co.*, 883 F.2d 1172, 1176 (5th Cir. 1987). Petitioners have been denied the right to be heard. Despite that result, the court of appeals failed to address these fundamental principles.

* * *

APPENDIX H

NO. 00-0582

IN THE SUPREME COURT OF TEXAS

C.C. KILGORE, ET AL

Petitioners

v.

BLACK STONE OIL CO., ET AL

Respondents

On Petition For Review From The Ninth District Court of Appeals at Beaumont, Texas

PETITIONERS' BRIEF ON THE MERITS
(Filed Oct. 16, 2000)

SHEINFELD, MALEY & KAY
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(713) 658-9756 (fax)
ATTORNEYS FOR PETITIONERS
C.C. KILGORE, ET AL

OF COUNSEL:
Donald M. Hunt
Carr, Hunt & Joy L.L.P.
1001 Texas Avenue
Lubbock, Texas 79401

* * *

3. *STARE DECISIS* BASED ON A FACT-FINDING DEPRIVES PLAINTIFFS OF DUE PROCESS OF LAW AND DUE COURSE OF LAW.

Despite the importance of the constitutional issues stressed by Plaintiffs, the Beaumont court did not consider any of the basic rights their "unorthodox" *stare decisis* ruling would affect. Plaintiffs' predecessors (1) were not parties in *Carter v. Collins;* (2) were not privies of parties in that case; and (3) were not represented and did not control the presentation of claims in that case. The court's ruling denies to Plaintiffs a full and fair opportunity to litigate the location issue. Having that opportunity is an elementary requirement of procedural due process of law.

A. Plaintiffs Are Entitled To Their Day In Court.

Both this Court and the United States Supreme Court have written on this issue. In *Benson v. Wanda Pet. Co.*, 468 S.W.2d 361 (Tex. 1971), Mrs. Benson, who was injured in a car accident, was not a party and did not participate in a trial against the oil company brought by another party injured in the accident. The trial resulted in a verdict for the oil company. When Mrs. Benson sued, the oil company pleaded collateral estoppel. This Court rejected the oil company's plea on due process grounds, as follows:

> Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that,

> at the least, the presently asserted interest was actually and adequately represented in the prior trial.

468 S.W.2d at 363.

Not having been a party in the first trial, and not in privity with the first plaintiff, Mrs. Benson was entitled to her day in court, to prosecute her claim in her own right.

The touchstone of procedural due process is the existence of a full and fair opportunity to litigate the issue. Not coincidentally, that is also the touchstone for the application of collateral estoppel, addressed by this Court numerous times since *Benson*. *See Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984); *Tarter v. Metropolitan Sav. & Loan Ass'n.*, 744 S.W.2d 926, 927 (Tex. 1988); *Eagle Properties Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990); *Sysco Food Services Inc. v. Trapwell*, 890 S.W.2d 796, 801 (Tex. 1994). It is not possible to argue that Plaintiffs have had the opportunity to litigate the location issue. They have not had their day in court.

The United States Supreme Court confirms this elemental requirement of due process. In *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940), a case involving a restrictive covenant which had been upheld in previous litigation in which the current claimants were not parties, the Court specifically held that the fact that some of the parties in the earlier case occupied the same position as the current claimants did not insulate the result from a due process attack: a person who is not bound by a prior judgment because he was not a party or was not served with process is not bound by that judgment [citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)]; "and judicial action enforcing it

against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require." 311 U.S. at 40-41.

Further, in *Blonder-Tongue Lab. Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1970) a case involving the question of the mutuality of estoppel by judgment, the Court noted one class of persons against whom such an estoppel could not apply:

> Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

402 U.S. at 329.

Thus, even if *Carter v. Collins* had involved some but not all Escobeda *mineral* owners, a *fact-finding* still could not bind absent owners. *Kirby Lumber Corp. v. Southern Lumber Co.*, 196 S.W.2d 387, 389 (Tex. 1946) (co-tenants are not in privity; a judgment binding one co-tenant will not bind others who were not parties).

Further, in *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 323, 332 (1979), a case which authorized the use of offensive collateral estoppel, with limitations, the Court confirmed that the basis for the application of the doctrine was that the party seeking to use it had had a full and fair opportunity to litigate his claims in the earlier action. Although our case involves the *defensive* use of collateral estoppel (by its illegitimate equivalent, *stare decisis* based

on a fact-finding), the principle is the same: if a party has not had a full and fair opportunity to litigate the issue, he has been denied due process of law.

B. The Restatement Supports Petitioners' Due Process Position.

The concept of non-parties not being bound by a prior judgment, and not being affected by issue preclusion, as a matter of due process, is well-recognized by the Restatement (Second) of Judgments. Section 34(3) recognizes that "a person who is not a party to an action is not bound by or entitled to the benefits of the rules of *res judicata*, . . . "[47] Further, the Restatement recognizes that the rule of "full and fair opportunity to litigate the issue" is the essence of due process. *See* § 29, comment b: "A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process."

The Restatement general rule of issue preclusion is set forth in § 27:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

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[47] *Res judicata* includes collateral estoppel for the purposes of the Restatement. *See* Introduction, Par. a, page 2. Section 34(3) states that §§ 30-32 may be exceptions to the rule set forth in that section. Those sections deal with situations which are not present here, so do not apply.

That rule does not encompass *non-parties*. Further, § 28 states several exceptions to the general rule, evincing circumstances in which *parties* could avoid the preclusion rule. If some circumstances allow *parties* to avoid the rule, the same circumstances applied to *non-parties* would show even stronger reasons not to apply issue preclusion against *non-parties*. Thus, § 28(1) prevents issue preclusion when the party "could not, as a matter of law, have obtained review of the judgment in the initial action." Not being parties in *Carter v. Collins*, Plaintiffs' predecessors, as a matter of law, could not have obtained review of the judgment. Further, § 28(5)(c) recognizes that a party ought not to be precluded from litigating an issue if because of some "special circumstance," he did not have "an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Plaintiffs' predecessors were precluded from participating in *Carter v. Collins* and thus had no opportunity to obtain a full and fair adjudication of the location issue.

C. Professor Hodges Supports Petitioners' Due Process Position.

Finally, the due process effect of applying "unorthodox" *stare decisis* in a boundary case was noted by Professor Hodges in his 1943 article.[48] After strongly noting the obvious contention that the right to trial by jury would be denied by that application,[49] Professor Hodges said, "[o]r it might be contended that he would

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[48] 21 Tex. L. Rev. 241 (1943).

[49] See that issue, page 37 herein.

be deprived of his property without procedural due process of law under the Federal Constitution and without the due course of law required by the Texas Constitution."[50] Professor Hodges then referred to the due process holding of *Hansberry v. Lee*.[51] His prescience recognized the constitutional problems as such in the very context established by this case.

The effect of enforcing the jury finding in *Carter v. Collins* against Plaintiffs is to preclude the litigation of a *fact* issue. The Beaumont court is therefore using "unorthodox" *stare decisis* to accomplish what collateral estoppel does, but could not do here because privity is not present. Since elementary principles of due process prevent the preclusive effect of collateral estoppel when the safeguards are absent, a device which is the equivalent of collateral estoppel is equally infirm when it, too, lacks the safeguards.[52]

The basic concepts and principles, stated above, could not be clearer: to the extent a prior decision turns on a question of *fact*, as opposed to a question of *law*, elementary principles of due process deny preclusive effect against strangers to the prior case. That is the situation here. To preclude Plaintiffs from their day in

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[50] 21 TEX. L. REV. at 275.

[51] 311 U.S. at 40-41.

[52] *See also Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (due process denied when person against whom conclusive effect of judgment is invoked was not a party or privy to the prior judgment); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1176 (5th Cir. 1987) (party not joined in prior case has due process right to be heard).

court based on a fact-finding in *Carter v. Collins* is to deny Plaintiffs a full and fair opportunity to litigate the issue, and thus violates Plaintiffs' right to due process of law under both the Fourteenth Amendment to the United States Constitution and Article 1, § 19 of the Texas Constitution. (Petition Appendix, tabs 5 and 7). The right to be heard includes a full hearing, the right to produce evidence at a meaningful time and in a meaningful manner, and to have judicial findings based on that evidence. *See Derbigny v. Bank One*, 809 S.W.2d 292, 295 (Tex. App.–Houston [14th Dist] 1991, no writ). Plaintiffs have not had that opportunity.

* * *

APPENDIX I

NO. 00-0582

IN THE SUPREME COURT OF TEXAS

C.C. KILGORE, ET AL

Petitioners

v.

BLACK STONE OIL CO., ET AL

Respondents

On Petition For Review From The Ninth District Court of Appeals at Beaumont, Texas

PETITIONERS' MOTION FOR REHEARING
(Filed Jan. 26, 2001)

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* * *

2. Plaintiffs Are Being Deprived Of Basic Constitutional Rights.

"The protection of one's right to own property is said to be one of the most important purposes of government." That's what this Court said about property ownership and due process of law in *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). The Court went on to say, "That right has been described as fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions." *Id.* Notwithstanding the clear denial of due process in this case, resulting in both a deprivation of Plaintiffs' property and a denial of an opportunity to be heard, the "important purpose[ ] of government," recognized and adopted by this Court in *Eggemeyer*, has not served its purpose here.

Further, in *Benson v. Wanda Pet. Co.*, 468 S.W.2d 361 (Tex. 1971) this Court found unconstitutional an effort by the oil company to deny Mrs. Benson an opportunity to prove her damages resulting from a car wreck, after the oil company had won a verdict in a previous case brought by another person injured in the same wreck. Specifically, this Court upheld Mrs. Benson's right to be heard on due process grounds:

> The suit at bar is a separate and distinct action for redress for personal injuries. Mrs. Benson was not a party to the former action instituted by the Porters following her non-suit and they did not represent her in her claims against Wanda, respondent here. It was not

> shown that Mrs. Benson participated in, or exercised any control over, the trial in the Porter suit, or that she had any right to do so. She was not shown to have any beneficial interest in the recovery of damages for personal injuries on behalf of the Porters. In our view, the requirements of due process compel the conclusion that a privity relationship which will support application of the rules of res judicata does not exist under those circumstances. Accordingly, we hold that the fact findings and judgment in the Porter suit do not bar Mrs. Benson, and that she is entitled to her day in court in prosecuting this action in her own right.

Plaintiffs' position here is stronger than Mrs. Benson's. Plaintiffs were not in the same car wreck, figuratively speaking. Mrs. Benson was once a party in the first case. Plaintiffs and their predecessors have not been a party in any case, and there is no evidence that anyone in the mineral chain of title ever knew of *Carter v. Collins* before this case.

Benson involved pleas of *res judicata* and collateral estoppel. Consistent with collateral estoppel, *Carter v. Collins* involved only a factual determination. By limiting their *stare decisis* argument solely to a fact-finding, Defendants *conceded* that *Carter v. Collins* involved only a fact-finding and that it did *not* involve a question of law. Without question, the court in *Carter v. Collins* specifically held only that it was approving a factual determination.[6]

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[6] "The ultimate effect of these assignments is to raise the question that the verdict of the jury on the issues of boundary is not supported by the evidence and that the charge of the

There can thus be no doubt that the effect of the Beaumont court's reliance on *Carter v. Collins* is to apply a fact-finding as a bar to the Plaintiffs' opportunity to be heard. Since there was no privity and no representation (which are in any event matters to be proved by Defendants), under the holding of this Court in *Benson*, Plaintiffs are being denied due process of law.[7]

If anyone is denied the opportunity to present their evidence at a meaningful time and in a meaningful manner and to have judicial findings based on that evidence, that person has been denied one of the basic rights of freedom and citizenship. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process of law is so elemental in our legal system that no detailed exposition of the basis for and application of so basic a principle is necessary. *Id.* at 550. Neither *stare decisis* nor *res judicata* nor collateral estoppel can be a bar to the opportunity to be heard when due process is absent. *See Hardy v. Johns-Manville Sales*

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court . . . is not sustained by the facts of the case . . . " 192 S.W. at 317. "These were all issues for the jury to determine from the evidence submitted to them, and, having determined them adversely to appellants, and their findings being amply supported by the evidence, it is not the province of this court to disturb them." 192 S.W. at 321.

[7] The application of a fact-finding by the Beaumont Court as a bar to Plaintiffs' opportunity to be heard, and the approval of that bar by this Court, constitute "state action" within the Fourteenth Amendment to the United States Constitution. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1947). Both the Beaumont Court and this Court are therefore denying to Plaintiffs the due process of law to which the Fourteenth Amendment entitles them.

Corp., 681 F.2d 334, 338 (5th Cir. 1982); *Benson & Ford Inc. v. Wanda Pet. Co.*, 883 F.2d 1172, 1176 (5th Cir. 1987).

Is there a question about whether Plaintiffs have a property right entitled to protection? Defendants *admitted* that Plaintiffs own the Escobeda mineral title.[8] It is a fee simple title. There is no question about whether such property rights are protected by due process. The United States Supreme Court said this about that protection:

> Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681-82 (1930).

This Court, in *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921) eloquently expressed the importance of protecting property rights:

> To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty – an expression of his freedom,

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[8] Defendants admitted this fact in papers in this case as well as by taking leases from Plaintiffs in 1984 which described the Escobeda League as being in conflict with the junior Colville, Thompson and Wyllie Surveys.

guaranteed as inviolate by every American Bill of Rights.

* * *

The ancient and established maxims of Anglo-Saxon law which protect these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history – the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that befits free men.

And in *Steddum v. Kirby Lumber Co.*, 221 S.W. 920, 921 (Tex. 1920), the Court said this:

In order to constitute due process, it is necessary that notice shall be given and an opportunity to be heard before the punishment of forfeiture of property rights can be inflicted. We also think that the proceeding to be sufficient must have been brought for the purpose of ascertaining the guilt of the wife and obtaining a judgment declaring such forfeiture, and that she must have had notice both of the proceeding and its purpose. The effect of the due process of law provision in the constitution of the several states, and of the United States, has been discussed more frequently perhaps than that of any other constitutional guaranty.

The *Steddum* court then quoted the following from *In re Rosser*, 101 Fed. 562, 567 (8th Cir. 1900):

> The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws, and cannot be sustained.

It is unquestioned that the location of the Escobeda mineral estate was not placed in issue in *Carter v. Collins*. That could only have been accomplished by joining Plaintiffs' predecessors as parties. Notwithstanding the absence of the mineral owners, and notwithstanding the absence of "a course of legal proceedings according to

those rules and forms which have been established for the protection of private rights," *Id.*, *Carter v. Collins* has caused the loss of the mineral title. *Spann* and *Steddum* do not permit a property right to be lost or destroyed in such a manner.

There can be no doubt about the deprivations suffered by Plaintiffs or about the responsibility of government, including its courts, to protect those precious rights. The current Beaumont court has held that *Carter v. Collins* took away Plaintiffs' property rights without notice, without the opportunity to be heard and without privity or representation. The absence of privity and the absence of representation in *Carter v. Collins* condemn the denials by the lower courts of Plaintiffs' opportunity to be heard as a clear violation of due process. The denial and destruction of Plaintiffs' property rights without an opportunity to protect them condemns that destruction as a clear violation of due process of law.

Because the constitutional rights at issue here are so basic and have so clearly been denied in this case, and because the protection of such rights is one of the most important purposes of the exercise of the judicial power, Plaintiffs are frankly at a loss to understand why the Court has chosen not to address Plaintiffs' rights here. There is no more important consideration in the administration of justice than the assurance to the citizens of this State by their Supreme Court that their constitutional rights are secure. If not from the Supreme Court, then from whom may Texans obtain that assurance and security?

CONCLUSION AND PRAYER

Speaking not only on behalf of Plaintiffs but also as a practitioner in land and boundary cases and oil and gas cases for nearly forty years, including cases before this Court, counsel for Plaintiffs expresses assiduously to the Court that the pending Beaumont opinion cannot possibly be squared with Texas law dealing with severed mineral titles. The harm is immediate, extreme and incalculable. For that reason alone the decision must be reversed and removed from the body of law of this State. Further, the failure of the Court to protect valuable property rights from wrongful destruction and to protect precious due process rights from wrongful denial sends an alarming message to the citizens of Texas. It cannot be that the court of last resort in this State is unwilling to assure the security of the most basic rights of its citizens. What good is having a constitutional right if it is not protected?

* * *

APPENDIX J

W. T. CARTER & BRO. et al. v. COLLINS et al. (No. 68.)

(Court of Civil Appeals of Texas. Beaumont. Oct. 26, 1916. Rehearing Denied Nov. 23, 1916.)

Appeal from District Court, Polk County; L. B. Hightower, Sr., Judge.

Trespass to try title by V. A. Collins, Robert Dunham, and Mrs. Mary Colville against W. T. Carter, E. A. Carter, and Jack Thomas, a copartnership doing business under the name of W. T. Carter & Bro. and Thompson-Tucker Lumber Company. Judgment for plaintiffs, and defendants appeal. Affirmed.

S. H. German, of Livingston, and Townes & Vinson and Baker, Botts, Parker & Garwood, all of Houston, for Appellants.

W. D. Gordon, V. A. Collins, and Thos. J. Baten, all of Beaumont, and J. L. Maury, of Livingston, for appellees.

CONLEY, C. J. This was an action of trespass to try title brought by appellees, V. A. Collins, Robert Dunham, and Mrs. Mary Colville, against W. T. Carter & Bro., a partnership composed of W. T. Carter and E. A. Carter and Jack Thomas, and also against the Thompson-Tucker Lumber Company, a private corporation, to recover all of the Thomas Colville league of land in Polk county, save and except a strip 1,000 varas wide by 5,000 varas long off of the southwest portion of the league, known as the "1000-vara strip." The title to a tract of 320 acres known as the "Handley tract" in the east corner of the Colville league, claimed by appellants in their answer, was conceded to be in appellants, and judgment was accordingly

rendered in their favor, and that tract is therefore not involved in this appeal. Appellants, in addition to their pleas of general denial and not guilty, disclaimed any interest in or title to the Thomas Colville league, save and except whatever part thereof might be included within the following boundaries, the same being referred to as the Bartolo Escobeda league of land, title to the said Bartolo Escobeda being issued on the 22d day of June, 1835, and which they described as follows:

"Beginning at the most northern corner of the Lowry T. Hampton league survey, from which a white oak 20 inches in diameter bears south 47 east 8 varas distant and another white oak 18 inches in diameter bears south 1½ west 7 varas distant; thence north 45 east 5,000 varas to a corner from which a pine 15 inches in diameter bears south 80 east 4 varas, and a black oak 15 inches in diameter bears north 2½ west 11.1 varas distant; thence north 45 west 5,000 varas to a corner, from which a cotton wood 14 inches in diameter bears north 14 east 13.2 varas distant, and a black oak 20 inches in diameter bears south 80½ west 9.1 varas distant; thence south 45 west 5,000 varas to corner; thence south 45 east 5,000 varas to the beginning, containing one league of 4,428 acres of land."

As to the land included within the above boundary, the appellants pleaded title by legal conveyances from the sovereignty of the soil, and also pleaded 3, 5 and 10 years' statutes of limitation. The case was tried with a jury, and was submitted on special issues, upon the answers to which the court entered judgment in favor of appellees for all of the Colville, except the Handley 320-acre tract, and the 1,000-vara strip above referred to. In due time appellants filed their motion for a new trial,

which was overruled, and an appeal was perfected to this court.

The principal questions to be determined upon this appeal are as follows: First. Do the Escobeda and Colville leagues conflict? Second. If they do not conflict, have the appellants perfected title to the Colville land by virtue of the statutes of limitation, under deeds and muniments of title describing the identical land? Third. If the Escobeda and Colville leagues do not conflict, and appellants are not entitled to recover under their pleas of limitation, are not appellants entitled to recover the Tom Kinard 140-acre tract by virtue of the statute of limitation?

It is conceded that the appellants have title to the Escobeda league, and the appellees have the record title to the Colville league, except the Handley 320 acres and the 1,000-vara strip, and that the Escobeda is an older grant than the Colville.

In the solution of the issues involved, the first question presented for consideration is, Do the Escobeda and the Colville leagues conflict? The jury found that they do not conflict. But the appellant contends: First, that the undisputed evidence showed that the two leagues were located in conflict, except as to the 1,000-vara strip off of the southwest portion of the Colville league; and second, that it was therefore error to submit the issue of conflict to the jury, as was done by the trial court; and, third, that the findings of the jury that the two leagues were not in conflict is contrary to the undisputed evidence, or, at least, contrary to the great preponderance of the evidence, and should therefore be set aside.

These contentions are embraced in appellants' first five assignments of error. The ultimate effect of these assignments is to raise the question that the verdict of the jury on the issues of boundary is not supported by the evidence, and that the charge of the court submitting such issues is not sustained by the facts of the case, and we will discuss the subject from such viewpoint, without treating seriatim each assignment of error as found in the brief.

The Bartolo Escobeda league was originally surveyed by S. C. Hirams, the field notes bearing date March 31, 1835, same being as follows:

"XBD Title June 30, 1835, Vol. 20, p. 583,
Polk Co. XBD V 83.

"Field notes of a league of land surveyed by Bartolo Escobeda on the east side of Trinity on the branch of the Neches called the Big Sandy. Beginning at the northwest corner of league No. 2 surveyed for Lowry T. Hampton mound and stake, from which a black oak 20 inches in diameter bears south 47 deg. east 8 varas dist. also a white oak 18 inches in diameter bears south 1½ deg. west 7 varas distant, thence north 45 deg. east 2430.3 varas Big Sandy running south 15 varas wide, 5000 varas, made a mound and planted a stake, from which a pine 15 inches in diameter bears south 80 deg. east, 4 varas distant; also a black oak 15 inches in diameter bears north 2½ deg. west 11.1 varas distant. Timber, Pine, oak, elm, hackberry and hickory, undergrowth cane, sassafras and myrtle, some overflow and the land on the west side rich and fertile, but on the east mostly poor sandy land; thence north 45 deg. west 580.5 varas, pine 20 inches in diameter, line tree, 5000 varas, mound and stake, third corner, from which an elm 14 inches in diameter bears north 14 deg. east 15.2 varas distant, also a black oak 20 inches in

diameter bears south 80½ deg. west 9.1 varas distant. Timber principally pine, undergrowth myrtle, cypress and paw paw; thence south 45 deg. west 385 varas, pine 18 inches in diameter, line tree 543.5 varas, black oak 18 inches in diameter, line tree, 4250 varas Big Sandy, 5000 varas mound and stake, fourth corner, timber pine, oak, hickory, and hackberry, undergrowth, myrtle, peach and cane, land generally rich and fertile. Thence south 45 deg. east 5003.5 varas, fell 4½ varas south of the place of beginning, timber of a good quality, pine, oak, magnolia, beech and land rich, north 45 deg. west on true line, 5003.5 varas to the fourth corner, containing one league, about 7 labors of good farming land.

"S. C. Hirams, Surveyor,

"March 31, 1835."

This surveyor surveyed the Juan Falcon on the same day. The Thomas Colville was surveyed on June 24, 1835. The Lowry T. Hampton on March 14, 1835, the A. Wiley on June 24, 1835, the Henry Cone on the ___ day of ___, 1835, the A. Emanuel on June 24, 1835, and the F. Castanado on June 1, 1835. These are all adjoining surveys and their location, as well as other matters hereinafter referred to are shown on the following map:

hackberry, undergrowth, myrtle, peach and cane, land generally rich and fertile. Thence south 45 deg. east 5003.5 varas, fell 4½ varas south of the place of beginning, timber of a good quality, pine, oak, magnolia, beech and land rich, north 45 deg. west on true line, 5003.5 varas to the fourth corner, containing one league, about 7 labors of good farming land.

"S. C. Hirams, Surveyor.

"March 31, 1835."

This surveyor surveyed the Juan Falcon on the same day. The Thomas Colville was surveyed on June 24, 1835. The Lowry T. Hampton on March 14, 1835, the A. Wiley on June 24, 1835, the Henry Cone on the ——— day of ———, 1835, the A. Emanuel on June 24, 1835, and the F. Castanado on June 1, 1835. These are all adjoining surveys and their location, as well as other matters hereinafter referred to are shown on the following map:

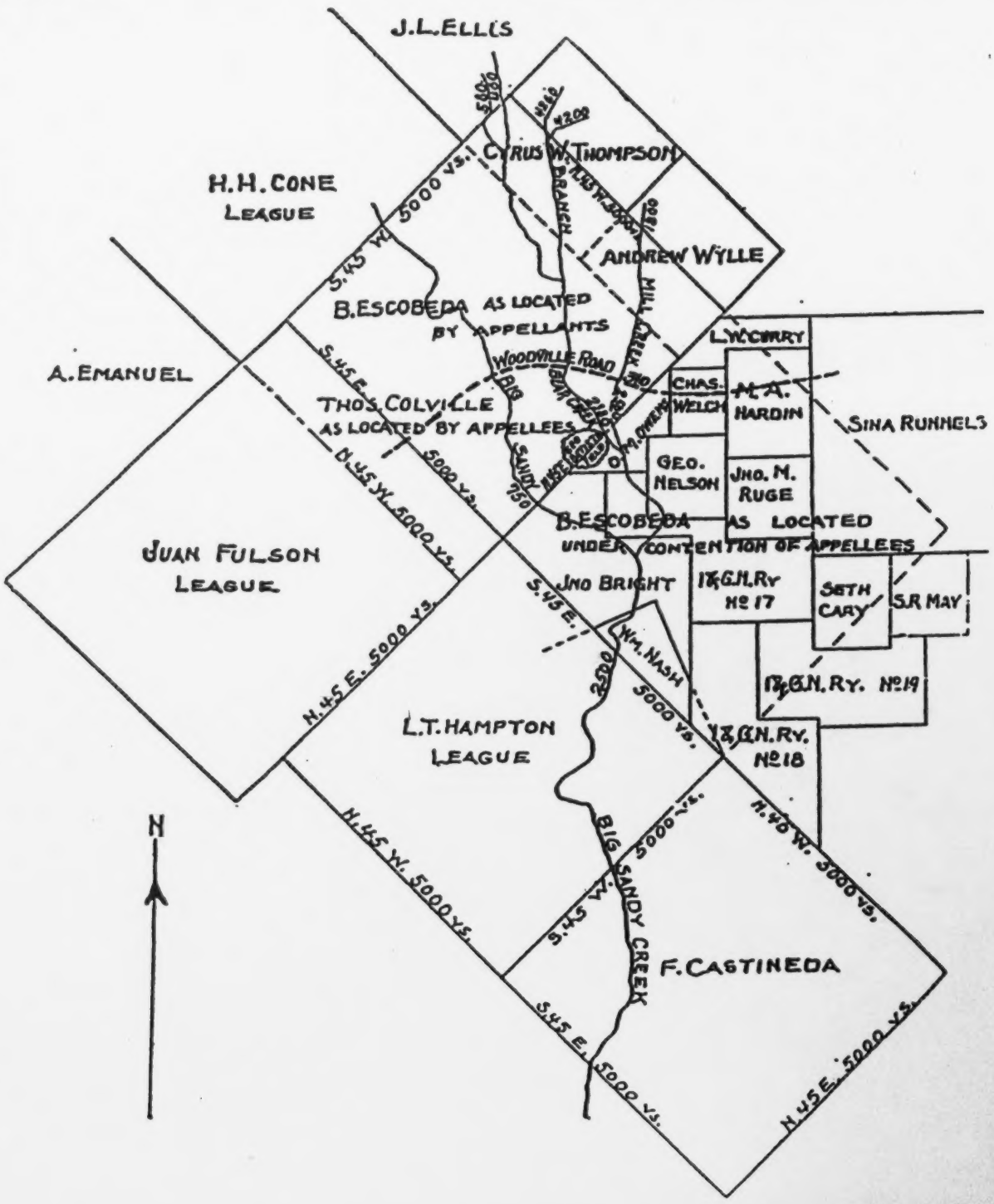
The field notes of the Colville are as follows:

"XBD Title Aug. 30/35 Vol 21 p 815 Polk Co.
XBD V 115

"Field notes of a League of Land surveyed for Thomas Colville on Big Sandy. Beginning at the S W corner of a league surveyed for Doctor Cone.

"Thence: N 45 E 340" Branch bears S 10E 580" branch bears S 25 E, 1195" Spring branch bears S 80 E 3280" Creek 8 varas wide bears S 10 E 5000" 2nd corner from which a pine 30 in di bears N 30 W 9 varas dist also a White Oak 8 in di bears N 53 E 13.1 varas dist. Oak, ash, hickory, sugartree, magnolia and some pine timber. Undergrowth Cane, dogwood & Myrtle, Land fertile.

"Thence S 45 E 830" Big Sandy, 900" Big Sandy again, 999" Big Sandy again 8 varas wide Bears South 2180" beautiful spring, 2980" trace leading from the lower village on Trinity to the prairie or Alabama Village on the Naches, 4090" creek 3 varas wide bears S 40 E, 4910 spring



App. 53

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The field notes of the Colville are as follows:

"XBD Title Aug. 30/35 Vol 21 p 815 Polk Co. XBD V 115

"Field notes of a League of Land surveyed for Thomas Colville on Big Sandy. Beginning at The S W corner of a league surveyed for Doctor Cone.

"Thence: N 45 E 340" Branch bears S 10E 580" branch bears S 25 E, 1195" Spring branch bears S 80 E 3280" Creek 8 varas wide bears S 10 E 5000" 2nd corner from which a pine 30 in di bears N 30 W 9 varas dist also a White Oak 8 in di bears N 33 E 13.1 varas dist. Oak, ash, hickory, sugartree, magnolia and some pine timber. Undergrowth Cane, dogwood & Myrtle, Land fertile.

"Thence S 45 E 830" Big Sandy, 900" Big Sandy again, 999" Big Sandy again 8 varas wide Bears South 2180" beautiful spring, 2980" trace leading from the lower village on Trinity to the prairie or Alabama Village on the Naches, 4096" creek 3 varas wide bears S 40 E, 4910 spring branch, 5000" 3rd corner from which a beach 18 in di bears S 11 E 13.1 varas dist. Also a red oak 10 in di bears S 62 deg. 30' E 5 varas dist. Oak, ash, beach, magnolia and pine undergrowth cane dogwood & myrtle, land rich.

"Thence S 45 W 4250" Big Sandy 10 varas wide bears S 8 E 5000.5 4th corner, oak, ash, sugartree and pine timber, Undergrowth cane, dogwood & myrtle, land rich.

"Thence on random line, or along the Eastern boundary line of league 5000" to the place of beginning, containing one league of about 6 labors of farming land.

"June 24th, 1835 Notes Sent S. C. Hiroms."

The great preponderance of the evidence in this case establishes the fact that the Thomas Colville league was actually located on the ground as shown in the above plat. Several of the corners were identified by original

witness trees still standing, and the lines running out from these corners fit calls for most of the natural objects called for in the field notes, although some of the streams crossing its lines are misnamed. The field notes of the Andrew Wiley, dated June 24, 1835, and made by the same surveyor who located the Thomas Colville, call for the southeast corner of the Thomas Colville, and ties said survey to its southeast corner. The Colville field notes have their beginning corner at and called for the Cone league. The beginning corner of the Colville is as follows:

"Beginning at the southwest corner of a league surveyed for Doctor Cone."

There is no question about the location of the Cone league. The A. Emanuel calls to begin at this corner of the Cone.

The undisputed evidence shows that the L. T. Hampton league is located just as it is found on the ground, and as it is placed in the above map, and yet, the surveyor who did the work, in surveying the Hampton league, made an error in his very first call; beginning on the east bank of Big Sandy creek, the field notes call is "Thence south 45 deg. east 2,500 varas," when, in fact, it should be "south 45 deg. west, 2,500 varas." In this same survey the third corner is tied to Big Sandy creek "south 45 deg. east 2,430 varas," when the distance, as found on the ground from this corner of the league, is 2,660 varas. These discrepancies are not the only evidence of loose and inaccurate work on the part of this surveyor. Aside from the uncertainties affecting the location of the land involved in this suit, a number of the other adjacent surveys, made approximately at the same time, contained

more or less inaccurate calls. The western corner of the Hampton is designated as the "northwest corner." The southern corner of the Cone as the "southwest" corner, and the eastern corner as its western corner. As a matter of fact, his calls for adjoining and contiguous corners are nearly all misnamed, and called northwest for north, southeast for south, northeast for east and northwest for west.

Although the Escobeda and Falcon surveys were made on the same day, by the same surveyor, Hirams, yet a literal construction of the field note calls of these two surveys, and constructing the Escobeda by course and distance from the beginning corner called for, places said surveys in conflict, and rests one upon the other. The General Land Office maps for 1841 and 1856, in evidence, so place these surveys.

If the Escobeda is located on the Falcon, it would not touch Big Sandy creek. In the field notes of the Escobeda, Big Sandy creek is a prominent feature in the various calls. It is clearly shown by the evidence that Big Sandy creek has not changed its course since these surveys were made. The Escobeda cannot be located so as to touch Big Sandy creek at any point, if it is placed in conflict with the Falcon. Therefore, it is illogical to assume that it was the purpose or intention of the surveyor to locate said league where the Falcon is located. To arrive at the intention of the original surveyor in the matter of locating the Escobeda, it is evident that some change has to be made and substituted in the field notes of that league. To locate

the league on the ground, it would be necessary, therefore, to look to the field note calls for natural and artificial objects, and, if possible, to find and identify them on the ground.

The north corner of the Hampton and the south corner of the Escobeda are coincident points, and call for the same witness trees. These trees have been found and identified on the ground. The evidence shows that both the appellants and the appellees are practically agreed that the beginning corner of the Escobeda, as fixed in its field notes, should be ignored. The northwest corner of the Hampton, and such beginning corner made to start at the north corner of the Hampton. The charge of the court so instructed the jury, and there is no complaint on either side to the charge, in this respect.

Although the appellants are willing to concede this change, and substitution in the field note calls of the Escobeda, they are not willing that any further change or substitution be made. From that beginning point, it is their contention that the Escobeda league must be constructed by course and distance, literally, in accordance with the field notes. While, on the other hand, it is the contention of appellees that if the league is so constructed it may be in accordance with the field notes calls for course and distance, it is inconsistent with the field note calls for the natural objects found and identified on the ground, and therefore the calls for course and distance must give way to the calls for such natural objects, and the league constructed accordingly.

In 1860 Gee, a county surveyor of Polk county, made a resurvey of the Escobeda, and returned his field notes

to the General Land Office, for the first time placing the land in conflict in General Land Office with the Thomas Colville, by making its beginning point the north corner of the Hampton, and constructing it solely by course and distance therefrom. It appears from these field notes and the certificate attached by him thereto that in making the resurvey, he found not a single bearing tree or line tree called for in the original field notes, except the ones called for at the north corner of the Hampton, and the south corner of the Escobeda. This is rather significant, since the survey at that time was only 25 years old, and the witness trees, as called for in the field notes, if they were on the land, in all probability should have been standing. He does state, however, that in running north 45 degrees east, he found a marked line, and at a point 5,000 varas he made a corner "on an old marked line that does not continue beyond the corner." The importance of these facts are materially reduced when we remember that the line he is referring to is a coincident line with the Colville and the Wiley surveys, both of which were made in 1835, and that this line is the only one of the Escobeda which both parties practically agree was actually surveyed when the league was located; the appellants contending that it constitutes the east line of the Escobeda, and the appellees that it is the west line of the Escobeda. The surveyor Gee also states that in running the line north 45 degrees west 5,000 varas from the north corner of the Escobeda, as located by him, he made "a corner on an old line." This point is located on the coincident line of the C. W. Thompson survey made in 1850, and for this reason the circumstance is not of great weight.

In constructing the Escobeda league from the beginning point at the north corner of the Hampton by course and distance, not a natural object called for in the field notes can be made to fit, as they are found and located on the ground. From the beginning corner, the first course is "north 45 degrees east 2430.3 varas, Big Sandy creek running south, 15 varas wide." On such course Big Sandy creek is found at 756 varas, and its course is almost east and west. On this same course what is known as Bear creek is reached at a point, according to appellees' evidence, at 2,476 varas, and is 9 varas wide, and crosses this line in an almost easterly and westerly direction. It is the contention of appellants that the surveyor Hirams, in the Colville field notes, called Bear creek "Big Sandy," and that, allowing for this error in name, and designating Bear creek "Big Sandy," as Hirams evidently thought it was, this natural object is found within 45.5 varas of the distance called for in the field notes. In response to this proposition, however, appellees urge: That the field notes call for a creek 15 varas wide, and that Bear creek at this point is only 9 varas wide, and that at the concluding corner of the first course of the Escobeda, the field notes describe the land adjacent to the corner on that line as follows:

"The land on the west side rich and fertile, and on the east mostly poor sandy land."

That if the line be extended north 45 degrees east 5,000 varas from the north corner of the Hampton, the soil is rich and fertile all the way through, and that there is found no such contrast in the nature of the soil at the south corner on this course as the field notes call for.

Much evidence is found in the record that if this call be reversed so as to run from the north corner of the Hampton south 45 degrees east, 5,000 varas, a corner will be established so as to fit the nature of the soil called for, and that the field note call for the natural object "Big Sandy, running south 15 varas wide," will be complied with, as the same is actually found on the ground. And, in this connection, they urge that the fact that Big Sandy on this course is located on the ground 2,660 varas from the north corner of the Hampton, instead of 2,430.3 varas, does not mitigate against the force of their contention, since the appellants concede that the Hampton league is properly located on the ground, and that the same error in calling for the distance of Big Sandy creek from the north corner of that league is made; such field notes designating this creek to be located at 2,430.5 varas.

It is to be noted that the third course of the Escobeda calls to cross Big Sandy again at 4,250 varas south 45 degrees west from the third corner, which corner, according to the contention of appellants, as they located Escobeda, is the north corner. This creek is actually found on the ground 2,780 varas from said corner, a variance in the field note calls of 1,170 varas. The appellees assert, and the evidence shows that if the Escobeda be constructed as the appellees contend it should be, and the third course call be substituted for the fourth course, that is to say, if the distance south 45 degrees west 4,250 varas be run from the north corner of the Escobeda, as they locate it, Big Sandy creek is found on the ground to be an exact fit to the call for course and distance.

Running north 45 degrees east from the eastern corner of the Hampton, there is no marked line. The eastern

corner of the Hampton is in a cleared field. At a distance of 5,000 varas from that corner in that course, the bearing trees given for the third corner of the Escobeda are not found. But, it is the contention of appellees that the surveyor Hirams surveyed only two lines of the Escobeda, as they locate it, and that he made random calls for the other lines. That these two lines are as follows:

"One of them is the line called for in the Escobeda field notes to run south 45 degrees west 4,250 varas, Big Sandy, 5,000 varas, mound and stake * * * timber pine, oak, elm, hackberry and hickory, undergrowth cane, sassafras and myrtle, some overflow and the land on the west side rich and fertile, but on the east mostly poor sandy land."

This is the west line of the Escobeda, as appellees contend it should be located. In transposing the field note calls for the third course and substituting it for the fourth course, the original calls in the Escobeda field notes fit the ground with exactness on this line. The other line, which they contend was surveyed, is the one running south 45 degrees east from the north corner of the Hampton, and crossing Big Sandy 15 varas wide, at exactly the same distance (less a half vara) that the Hampton crosses it. The evidence shows that this line of the Hampton is vouched for by all the witnesses who testified in the case.

It is further earnestly contended by the appellees that since the league is a rectangle, and two of its converging base lines have been found and identified on the ground, they have in fact located the league; the construction of the other lines being a mere mechanical process in making the application of the calls for course and distance in

the field notes. It is to be seen that if the Escobeda league is located as contended for by the appellees, it places it out of conflict with the other leagues and surveys, all of which were made by the same surveyor, and within a very short period of each other, and acquits the surveyor of doing an irrational thing, that of surveying one league upon another, when it was his official duty to locate the survey upon vacant domain, and without any intervening vacancies.

These were all issues for the jury to determine from the evidence submitted to them, and, having determined them adversely to appellants, and their findings being amply supported by the evidence, it is not the province of this court to disturb them.

It is the law of this state that where natural objects, as called for in the field notes, can be actually found and identified on the ground as showing the footsteps of the surveyor, both course and distance, when inconsistent therewith, must give way and be disregarded. Urquhart v. Burleson, 6 Tex. 502; Browning v. Atkinson, 37 Tex. 660. The courts of this state have undertaken to grant the dignity of calls in field notes, and to attach to them different degrees of importance. The first in importance are natural objects, such as streams, hills, mounds, nature of soil, etc. Next in importance are artificial objects, such as stakes, mounds, marked trees, etc., and the least of all, course and distance. This classification and grade of calls, however, is only a rule of evidence. The primary purpose in all cases of the kind is to locate the survey as it was intended to be located on the ground by the original surveyor, and if this can be accomplished with more certainty under the circumstances of the case by the calls

for course and distance, they will control. It has been determined, however, that only when the natural or artificial objects called for in the field notes can be found and identified on the ground with reasonable certainty will they control calls for course and distance. Browning v. Atkinson, 37 Tex. 660; Railway Co. v. Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781; Sloan v. King, 33 Tex. Civ. App. 537, 77 S. W. 48; Goodrich v. West Lbr. Co., 182 S. W. 341, where a general review of many of the decisions on that point will be found.

The charge of the court in submitting these issues contained a correct statement of the law for the guidance of the jury.

Appellants contend that they are entitled to a reversal of this cause under the principles announced in the Goodrich Case, supra, but there is a pronounced difference between the facts of that case and the present one. In the Goodrich Case, the court said:

"To our minds, nothing has been found of sufficient gravity to arrest the distance. No tree has been found, or bearing tree, called for in the original field notes. The surveyor does not say that any line was marked, but the contention is made that the old line, found running south 47 degrees east, is the east boundary line of the grant. The objection to this – and we think that same is conclusive – is that to accept this old line does not satisfy the quantity of land; that the length of the line is not satisfied; that no landmark referred to by the original surveyor can be found; and that in addition this old line, claimed to be the eastern boundary line of the grant, is found to extend only about two-thirds of the way across the four-league grant, or to about the Beasley corner, and cannot be found running any further south, although its course, as

testified to, runs through virgin timber. * * * Therefore we are persuaded to believe" that nothing has been found "to arrest or stop the north or northwest line of this grant. * * * "

In the present case, the field notes of the Escobeda contain calls for natural objects, and the evidence in the record contains facts upon which the jury were justified in determining that such natural objects were found and identified on the ground, so as to fix and locate the Escobeda league contrary to some of the calls for course and distance. Appellants' assignments of error 1 to 5 are therefore overruled.

Under assignments of error 6, 7, and 8, appellants contend that the court erred in not rendering judgment for them for the land sued for, under the five and ten years' statutes of limitation, the jury having answered that they, appellants, had held peaceable and adverse possession of the land in question for a period of more than 5 years, and more than 10 years before the filing of this suit, cultivating, using, and enjoying the same under deeds and memoranda of title, by and through their respective tenants, John Johnson and George Baptiste. The appellees in this case are, of course, claiming the land in controversy under the Colville title. The evidence shows that on the 15th of October, 1857, William T. Colville, a son and only heir of Thomas Colville, the original grantee of the Colville league, entered into a legal contract of lease with Thomas P. L. Kinard, as follows:

"Know all men by these presents: That I, Thomas P. L. Kinard, of the county of Polk, have this day rented of Wm. T. Colville of the county of Refugio and Orlando Dorsey the said Wm. T. Colville being the son and heir of

the late Thomas Colville, the league of land known as the Colville league lying on the Big Sandy it being the same league that I have heretofore rented from the said W. T. Colville for the last four years and on which I now reside, and I undertake and promise the said Colville and Dorsey to keep the said league of land in good order and condition and to keep trespassers off of the same and to let such persons occupy the land as will hold under me as the tenant of said Colville and Dorsey and no others, and I also undertake to improve the aforesaid league to the best of my ability and to pay to the said Colville and Dorsey the sum of one dollars per year so long as this lease shall last and it is further understood that this lease shall be renewed yearly in the absence of which renewal through the oversight or other cause the same shall continue for longer period.

"In testimony whereof I have this day hereunto affixed my hand and seal this 15th day of Oct. 1857.

Thomas P. L. Kinard.

his

"Witness: D D X Kinard.

mark

"Oct 15th 1859. The above lease is this day renewed on the same terms and conditions for two years and it not then renewed for one year longer.

Thomas P. L. Kinard.

his

"Witness: D D X Kinard."

mark

This instrument was acknowledged by Thomas P. L. Kinard before the county clerk of Polk county on December 25, 1860, was filed for record December 26, 1860, and is recorded in Book I, page 105.

The evidence is undisputed that Thomas P. L. Kinard and his first and second wives, and some of his children have been in possession of this land ever since the execution of said lease, and up to the time of the filing of this suit. As to whether or not they were claiming adversely to the Colville title or in recognition of it was a sharply disputed question, and much evidence was introduced on the subject by both sides. Several of the sons of Thomas P. L. Kinard testified in the trial of the case to the effect that their father, and after his death their stepmother, as well as themselves, always recognized the Colville title to the land, and were holding under the claim which their father had. The appellants, on the other hand, introduced evidence to the contrary, and produced, among other things, a lease contract dated the ___ day of November, 1882, between Mary Kinard and the heirs of G. S. Thomas, appellants' predecessor in title, and also produced a certified copy of the pleadings in a suit of trespass to try title filed in the federal court at Galveston in 1885, by appellees' predecessors in title, against the said Mary Kinard, the widow of Thomas P. L. Kinard, and others, in which they allege that on January 1, 1883, the plaintiffs in that suit were lawfully seized and possessed of the Colville league; "that on the day and year aforesaid the said defendants and each of them entered upon said tract of land without any right or title, and ejected the plaintiffs therefrom, and ever since then and until now unlawfully withhold from plaintiffs * * * the possession

thereof." In this suit Mary Kinard filed an answer, consisting of demurrers and plea of not guilty. She did not set up any adverse title by limitation.

On the question of repudiation of the Kinard tenancy, the court submitted the following question to the jury:

"Issue No. 10. After the death of Thomas P. L. Kinard in 1870, and up to January 1, 1883, did or did not Mary Kinard occupy the Colville land under the tenancy contract between Thomas P. L. Kinard and Dorsey and Colville? Let your answer be, 'She did,' or, 'She did not,' according as you find the facts to be."

The jury answered, "She did." This being a question of fact which has been settled adversely by the verdict of the jury, there is no basis for appellants' claim that the court should have entered judgment for them under the Kinard tenancy.

Upon this finding of the jury and the other practically undisputed evidence it follows that when Thomas P. L. Kinard became the tenant of Colville and Dorsey on the Colville league, that relationship continued between the parties and their privies up to the filing of this suit, there being ample evidence to support the theory that Mary Kinard and some of the children of Thomas P. L. Kinard, while always residing upon the land, gave full recognition to the tenancy of Thomas P. L. Kinard, and never held or claimed the land adversely to the Colville title. Hence the Kinard family were the tenants of the appellees and their predecessors in title from the date of the establishment of the Thomas P. L. Kinard tenancy up to the filing of this suit. Mattfeld v. Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030; Fowler v. Simpson, 79 Tex. 611, 15 S. W. 682,

23 Am. St. Rep. 370; Flanagan v. Parson, 61 Tex. 302; Cobb v. Robertson, 99 Tex. 138, 86 S. W. 746, 87 S. W. 1148, 122 Am. St. Rep. 609.

On the 17th day of March, 1884, John B. Johnson executed a lease contract to the heirs of G. S. Thomas, appellants' predecessor in title. This contract contained the following description of the land leased:

"4,428 acres of land, being the B. Escobeda league situated in Polk county, state of Texas, and for description reference is here made to the title to said league in the said B. Escobeda."

John B. Johnson testified that he lived on the land from the fall of 1877 up until the fall of 1887, and that he was on the land about 3 or 3½ years after he signed this lease. The contract also contained a provision that his tenancy commenced on October 25, 1882.

The court submitted to the jury the question of whether or not Johnson had peaceable and adverse possession of the land described in appellants' answer, cultivating, using and enjoying the same continuously for a period of five years as a tenant of Thomas' heirs, while they claimed under a deed, or deeds, duly registered, describing the land and paying taxes thereon during said period, and the jury answered in the affirmative. An examination of the record discloses the fact that not until February 21, 1907, in a deed made by Seth Grosvenor to W. S. Carlisle, one of appellants' predecessors in title, was there any deed or lease in appellants' chain of title attempting to describe the land claimed by appellants in any other way than by the description given in the original grant, which description, as heretofore stated, placed

said league in conflict with the Falcon, and in no manner in conflict with the Colville. The Gee field notes of the Escobeda, which place it in conflict with the Colville, although made in 1860, were not used in any of the leases or deeds in appellants' chain of title until the execution of the Carlisle deed above mentioned.

The object desired in requiring the registration of deeds under the plea of 5 years' limitation is to give notice to the owner of the land that persons in possession of it are claiming adversely to them, and, of course, this object will not be obtained unless the description of the land is such that it would indicate the land being claimed. Mistake in the name or number of the survey upon which the land may be situated, however, would not necessarily render the deed ineffective under the plea of 5 years' limitation, if there be cause for external objections, which definitely fix and designate the land, or if it be otherwise described so as to identify it with the land owned and claimed by the real and true owner. Randolph v. Lewis, 163 S. W. 647; Udell v. Peak, 70 Tex. 547, 7 S. W. 786; McCurty v. Locker, 2 Tex. Civ. App. 220, 20 S. W. 1109; Basham v. Stude, 128 S. W. 662; Stout v. Taul, 71 Tex. 438, 9 S. W. 329; Cleveland v. Smith, 156 S. W. 247; Griffin v. Houston Oil Co., 149 S. W. 567; Clifton v. Creason, 145 S. W. 323; Eastham v. Gibbs, 58 Tex. Civ. App. 627, 125 S. W. 372.

The field notes contained in the Johnson lease nor in any of appellants' recorded deeds during the continuation of the tenancy created by said lease do not embrace the land included in the Colville league, nor are they to be identified with the field notes made by the surveyor Gee, which field notes appellants adopt for the land

claimed by them in their pleadings, under the 5 and 10 years' statutes of limitation.

Johnson further testified to having made another lease contract on September 1, 1909, with W. T. Carter & Bro. and Thompson-Tucker Lumber Company. This contract is not copied into the record. It appears from the transcript of the pleadings in this case that the present suit was filed on June 3, 1914, and therefore appellants could not perfect title by limitation under the 5 years' statute based on the latter lease. For the reasons herein stated, the Johnson tenancy did not perfect title by limitation to the land under the 5 years' statute.

On the 14th day of June, 1885, George Baptiste and others entered into a lease contract with the heirs of G. S. Thomas and others, in which the land leased is described as follows:

"The league above mentioned is thus described: Beginning at the northwest corner of the Lowry T. Hampton league; thence north 45 deg. east (most eastern corner of league) 5,000 varas, thence north 45 deg. west (most northern corner) 5,000 varas; thence south 45 deg. west (most western corner) 5,000 varas, thence south 45 deg. east (most southern corner) 5,000 varas, and for more particular description reference is made to the grant to Bartolo Escobeda on the 22d of June, 1835, and the field notes of said survey now shown by certified copy on file in the county clerk's office, Polk county. The survey was made by S. C. Hirams, March 31, 1835."

There is testimony in the record showing that Baptiste lived on a small tract of the Colville for a great many years, and that he cultivated 8 or 9 acres thereof continuously for 34 years. There is also evidence in the record

that George Baptiste was also a tenant of appellees' predecessors in title under an agreement made with Judge Crosson, who, it is claimed, was acting for appellees' predecessors in title in making said lease contract. Issues 8 and 9, submitted to the jury by the court, cover the question of perfection of title by limitation by the appellants under the 5 and 10 years' statutes, based upon the Baptiste tenancy, and these two issues were answered in favor of the appellants. In issue No. 11 the court submitted to the jury the question of whether or not George Baptiste held possession of any part of the Colville league under any contract of tenancy with appellees' predecessor in title, and, if they found such a contract of tenancy, whether it had ever been repudiated. In answering this question, the jury found that such a contract of tenancy existed, and that it had never been repudiated.

The answers of the jury to these three questions are inconsistent and contradictory, and this is made the subject of attack under appellants' fourteenth assignment of error. However, under the view we take of appellants' limitation issues generally, such error is immaterial, and will not affect the disposition of this case; the jury having found that the Kinard lease executed to William Colville et al. in 1853 had not been repudiated by his widow, Mary Kinard, and the evidence being undisputed that some member of the Kinard family has lived on the Colville league continuously up to the time of filing of this suit, as the tenant of the true owners. Such possession of the tenants drew to the real owners the constructive possession of the entire survey, and therefore Johnson and Baptiste, conceding that the latter was the tenant of the appellants, and that all the leases and deeds

in appellants' chain of title had used such description of the land affected as to actually place it in conflict with the Colville, were still trespassers upon the land, and their possession must be restricted to that portion of the Colville survey actually reduced to possession. A trespasser entering under such circumstances can only disseize the true owner to the extent of the actual ouster. Whitehead v. Foley, 28 Tex. 284; Evitts v. Wroth, 61 Tex. 84; Bowles v. Brice, 66 Tex. 730, 2 S. W. 729; Houston Oil Co. v. Frazier, 161 S. W. 20; Village Mills Co. v. Houston Oil Co., 186 S. W. 785. Assignments of error 6, 7, 8, and 14, therefore, are overruled.

We do not find any merit in appellants' contention that there was a partition of the league of land between Wm. T. Colville and Orlando Dorsey in 1858 under the conveyance of Colville to Dorsey of that date, and that the possession of Kinard was on that portion of the league owned by Dorsey, and that therefore the tenancy of Kinard could not affect the possession of Colville. Under all the conveyances between these two parties, including the conveyance of 1858 and the ones of 1862 and 1868, the interests conveyed are undivided interests, and do not describe any specific portions of the league. The recital in the power of attorney executed by Wm. T. Colville to Orlando Dorsey in 1860 that his (Colville's) interest was in the north half of the league is an ex parte statement on his part, and there is no evidence of acquiescence in this statement by Dorsey. The record does not show that Dorsey ever accepted the power granted in said power of attorney, or that he ever sold any interest in said league thereunder.

We have deemed it unnecessary to go into appellees' proposition that they have also, in addition to the record title, acquired title by limitation under the 3 years' statute, by virtue of the Kinard tenancy, even conceding that there is a conflict in the Escobeda and Colville leagues, since we have found the record title to be in them.

The ninth assignment of error attacks the charge of the court in submitting special issue No. 11, that is the issue of tenancy of Baptiste with appellees' predecessor in title, because the proof is wholly insufficient to sustain it. The tenth assignment of error attacks the finding of the jury on this issue as contrary to the undisputed evidence. The eleventh assignment attacks the finding of the jury under said special issue No. 11 as being contrary to the great preponderance of the evidence, and on the ground that the jury was misled and actuated by passion and other improper motives. The twelfth assignment of error attacks the finding of the jury under said special issue No. 11, to the effect that the contract of tenancy had never been repudiated, as contrary to the undisputed evidence, and assignment of error No. 13 is that it was contrary to the great preponderance of the evidence. It follows from what we have said in passing upon the Kinard tenancy with the Colvilles, and upon appellants' limitation pleas generally, that these assignments are nugatory, and they are therefore overruled.

Appellants' fifteenth assignment is based upon the alleged error of the court in overruling its motion for judgment in their favor for the 141 acres of land described in the deed from T. P. Kinard to Matthews, and from Matthews to appellants, W. T. Carter & Bro., for the reason, as they claim, that the undisputed evidence

shows that the appellants and those whose estate they have, have had possession thereof more than 5 years, under circumstances giving them title under the 5 years' statute of limitation.

The sixteenth assignment of error is based on the same proposition affecting their claim under the 10 years' statute of limitation.

There appears in the record a deed from T. P. Kinard and wife to W. T. Carter & Bro., dated February 23, 1907, for the merchantable timber on 141 acres out of the Colville league, specifically described by metes and bounds. On the same day the same grantors executed a deed to J. H. Matthews for the same land as described in the foregoing deed, and Matthews on September 25, 1911, conveyed the same land to W. T. Carter & Bro. The evidence is undisputed that T. P. Kinard lived on this land for a great many years, and the evidence is probably sufficient to establish a limitation title thereto if the pleadings of appellants were in shape to support it. An examination of appellants' answer, in which the different statutes of limitation are pleaded, shows that there is no separate plea upon the part of appellants setting forth their claim to this particular tract of land. Appellants' plea of limitation covers the entire Escobeda league of land and a specific 320 acre tract included in what they claim to be the true boundary lines of the Escobeda. There is no attempt in the pleadings to set forth any claim to this specific tract of land under any of the statutes of limitation. Under such circumstances, the court did not err in refusing to enter judgment for said 141 acres. Houston Oil Co. v. Kimball (Sup.) 122 S. W. 533; Giddings v. Fischer, 97 Tex. 188, 77 S. W. 209.

Finding no error in the trial of this cause, the same is affirmed.